Yuny-Li Home Care Sdn Bhd v Fairview Development Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO MT1–24–863 OF 2008
NORAINI ABDUL RAHMAN JC
14 MAY 2009

Land Law — Classification of land — National Land Code — Caveat — Application to remove private caveat — Plaintiff's failure to enter caveat — Whether plaintiff was an aggrieved person — Whether defendant had a caveatable interest — Whether there were serious questions to be tried — National Land Code ss 327 & 329

The plaintiff entered into a sale and purchase agreement '(SPA') with the Malaysian Association of Productivity ('MAP'), for the purchase of a piece of land in the District of Petaling, Selangor Darul Ehsan ('the land'). MAP was the beneficial owner of the land. However, the plaintiff did not lodge a private caveat to protect its right or interest in the land. Thereafter when problems arose between the plaintiff and MAP with regard to the SPA, the plaintiff commenced an action against MAP for specific performance of the SPA. The plaintiff also applied for and was granted an interim injunction restraining MAP from dealing with the land pending the disposal of the civil suit. In the meantime MAP had entered into a joint-venture agreement ('JVA') with the defendant as a developer to construct an office building on the land for sale to the public. This JVA was entered into after the SPA between the plaintiff and MAP and whilst the interim injunction was in force. In order to protect its legal rights and interest in the land the defendant entered a private caveat on the land. When there were problems with the JVA, the defendant commenced a civil suit against MAP praying for a declaration that the JVA with MAP was terminated and also special damages of RM1,500,000, which was still pending. Although both parties were interested in the land, the plaintiff's right over the land was not protected by a caveat. Hence this application by the plaintiff for the removal of the caveat entered by the defendant. In its originating summons the plaintiff prayed, inter alia, that the private caveat entered by the defendant be removed and that an injunction be issued against the defendant to restrain it from entering further caveats on the land. In support of its application the plaintiff submitted that as a purchaser of the land suing for specific performance of the SPA it was aggrieved by the existence of the private caveat on the land. Further, if the caveat was not removed the plaintiff may not be granted the relief of specific performance in

its civil suit against MAP, because the existence of the caveat would prohibit the registration of the transfer of the title of the land to the plaintiff's name. The plaintiff further submitted that since the defendant had not claimed for specific performance but for damages, its claim was only for monetary relief and did not relate to an interest in the land. Hence the plaintiff contended that the defendant had no caveatable interest and no serious question to be tried in respect of a claim to an interest in the land. The defendant on the other hand contended that since the plaintiff had failed to enter a caveat when it should have it had lost any right or interest in the land and did not have any priority over the claim of the defendant. In resisting the application to remove the caveat the defendant submitted that the caveat should not be removed until the defendant's action against MAP was determined. The defendant therefore submitted that on the balance of convenience the caveat should be allowed to remain on the land until the disposal of the defendant's action against MAP.

Held, allowing the plaintiff's claims in part:

(1) The plaintiff as the purchaser suing for specific performance of the SPA was an aggrieved person within the meaning of s 327(1) of the National Land Code (see paras 28(a) & (b)).

(2) The defendant had already terminated the JVA it had entered into with MAP and had commenced an action against MAP praying for a declaration that the JVA was terminated and special damages, and not for specific performance. As such, the defendant's interest was to make a profit and not to own the land. In short, it had no caveatable interest in the land (see paras 30–31).

(3) The defendant's claim, which had to raise a serious question to be tried, had to relate to an interest in the land. However, as the defendant's intention was to terminate the agreement it was a claim for damages and that interest in damages was not caveatable (see para 32).

[Bahasa Malaysia summary

Plaintif telah menandatangani perjanjian jual beli '(PJB tersebut') dengan Malaysian Association of Productivity ('MAP'), untuk membeli sebidang tanah dalam Daerah Petaling, Selangor Darul Ehsan ('tanah tersebut'). MAP adalah pemilik benefisiari tanah tersebut. Walau bagaimanapun, plaintif tidak memasukkan kaveat persendirian untuk melindungi hak dan kepentingannya dalam tanah tersebut. Berikutan itu apabila masalah timbul antara plaintif dan MAP berkaitan PJB tersebut, plaintif telah memulakan tindakan terhadap MAP untuk pelaksanaan spesifik PJB tersebut. Plaintif juga memohon untuk dan telah diberikan injunksi interim menyekat MAP

daripada berurusan dengan tanah tersebut sementara menunggu guaman sivil selesai. Sementara itu MAP telah memasuki perjanjian usaha sama ('PUS') dengan defendan sebagai pemaju untuk membina bangunan pejabat atas tanah tersebut bagi jualan awam. PUS ini telah ditandatangani selepas PJB antara plaintif dan MAP dan semasa injunksi interim masih berkuatkuasa. Bagi melindungi hak dan kepentingan sahnya dalam tanah tersebut defendan telah memasukkan kaveat persendirian ke atas tanah tersebut. Apabila terdapat masalah dengan PUS tersebut, defendan telah memulakan tindakan sivil terhadap MAP memohon deklarasi agar PUS tersebut dengan MAP ditamatkan dan juga ganti rugi RM1,500,000, yang masih belum selesai. Meskipun kedua-dua pihak berkepentingan dalam tanah tersebut, hak plaintif ke atas tanah tersebut tidak dilindungi oleh kaveat. Justeru itu permohonan ini oleh plaintif untuk membatalkan kaveat yang dimasuki oleh defendan. Dalam saman pemulanya plaintif memohon, antara lain, agar kaveat yang dimasuki oleh defendan dibatalkan dan agar injunksi dikeluarkan terhadap defendan bagi menyekatnya daripada memasuki kaveat-kaveat lain atas tanah tersebut. Bagi menyokong permohonannya plaintif menghujahkan bahawa sebagai pembeli tanah tersebut yang menyaman untuk pelaksanaan spesifik PJB tersebut ia terkilan dengan kewujudan kaveat persendirian atas tanah tersebut. Tambahan pula, jika kaveat tidak dibatalkan plaintif mungkin tidak diberikan relief pelaksanaan spesifik dalam guaman sivilnya terhadap MAP, kerana kewujudan kaveat tersebut akan menghalang pendaftaran pindahan hak milik tanah tersebut kepada nama plaintif. Plaintif kemudian menghujahkan bahawa memandangkan defendan tidak menuntut pelaksanaan spesifik tetapi untuk ganti rugi, tuntutannya hanya merupakan relief kewangan dan tiada kaitan dengan kepentingan dalam tanah tersebut. Justeru itu plaintif menegaskan bahawa defendan tiada kepentingan kaveat dan tiada persoalan penting perlu dibicarakan berkaitan tuntutan terhadap kepentingan dalam tanah tersebut. Defendan sebaliknya menegaskan bahawa memandangkan plaintif telah gagal memasuki kaveat apabila ia sepatutnya berbuat demikian ia telah hilang apa-apa hak atau kepentingan dalam tanah tersebut dan tidak mempunyai keutamaan ke atas tuntutan defendan. Dalam menolak permohonan untuk membatalkan kaveat tersebut defendan menghujahkan agar kaveat tersebut tidak dibatalkan sehingga tindakan defendan terhadap MAP ditentukan. Defendan oleh itu menghujahkan bahawa atas imbangan kesesuaian kaveat tersebut patut dibenarkan untuk kekal atas tanah tersebut sehingga tindakan defendan terhadap MAP selesai.

Diputuskan, membenarkan sebahagian tuntutan plaintif:

(1) Plaintif sebagai pembeli yang menyaman untuk pelaksanaan spesifik PJB tersebut merupakan pihak yang terkilan dalam maksud s 327(1) Kanun Tanah Negara (lihat perenggan 28(a) & (b)).

(2) Defendan telahpun menamatkan PUS yang ditandatangani dengan MAP dan telah memulakan tindakan terhadap MAP memohon deklarasi bahawa PUS ditamatkan dan ganti rugi khas, dan bukan untuk pelaksanaan spesifik. Oleh itu, kepentingan defendan adalah untuk membuat keuntungan dan bukan untuk memiliki tanah tersebut. Pendek kata, ia tiada kepentingan kaveat dalam tanah tersebut (lihat perenggan 30–31).

(3) Tuntutan defendan, yang telah menimbulkan persoalan penting untuk dibicarakan, hendaklah berkaitan dengan kepentingan dalam tanah tersebut. Walau bagaimanapun, memandangkan niat defendan adalah untuk menamatkan perjanjian ia merupakan tuntutan untuk ganti rugi dan bahawa kepentingan dalam ganti rugi tidak boleh dikaveatkan (lihat perenggan 32).]

Notes

For cases on National Land Code, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2479–2480.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd [1989] 2 MLJ 202, HC (refd)

Butler v Fairclough (1917) 23 CLR 78, HC (refd)

Damodaran v Vasudeva [1974] 1 MLJ 128, HC (refd)

EM Buxton & Anor v Packaging Specialist Sdn Bhd [1987] 1 MLJ 342, HC (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)

Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145, FC (refd)

Luggage Distributor (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53, FC (refd)

Matair bin Suhaili & Anor v Rose Foo Chin Lan & Ors [2007] 6 MLJ 125; [2007] 5 CLJ 406, CA (refd)

Ng Kheng Yeow v Chiah Ah Foo & Ors [1987] 2 MLJ 330, SC (refd)

Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor [2003] 3 MLJ 522, CA (refd)

Rohaya bt Ibrahim v Yusof bin Ibrahim [2008] 7 MLJ 466, HC (refd)

Trans-Summit Sdn Bhd v Chun Nyook Lin [1995] 3 MLJ 247, CA (refd)

United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169, FC (refd)

Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487, CA (refd)

Legislation referred to

National Land Code ss 322(2)(a), 327(1), 329(2)

KL Pang (SY Cheong with him) (Cheah Teh & Su) for the plaintiff.
Zulkifli bin Khairuddin (SC Yong & Associates) for the defendant.

Noraini Abdul Rahman JC:

FACTS

[1] As background information, there are three parties involved in two separate agreements. The parties are:

(1) The Malaysian Association of Productivity ('MAP') which is the beneficial owner of a piece of land No HS(D) 78438 PT No 4067, Mukim of Damansara, District of Petaling, Selangor Darul Ehsan ('the said land') after it had entered into a sale and purchase agreement with PKNS. (Note: The name of PKNS still remains on the title as owner). In other words Malaysian Association of Productivity (MAP) is the beneficial owner. MAP is not involved in the present suit.

(2) Yuny-Li Home Care ('the plaintiff') which had entered into a sale and purchase agreement on 14 March 1989 with MAP. Yuny-Li Home did not lodge any private caveat on the said land. Yuny-Li Home was granted an interim injunction against MAP on 30 November 1992.

(3) Fairview Development Sdn Bhd ('the defendant') entered into a joint venture agreement on 28 March 1997 with MAP to construct an office building for sale to the public. (Note: This JV agreement is made after the first agreement between Yuny-Li Home ('plaintiff') and MAP and whilst interim injunction is in force. Fairview lodged a private caveat on the said land.

[2] Things did not go well with the two agreements as a result of which MAP was sued separately by Yuny-Li Home ('plaintiff') and Fairview Development.

[3] Yuny-Li Home ('plaintiff') is suing MAP for *specific performance of the said land*, amongst others. The defendant on the other hand in the statement of claim against MAP stated the following:

(16) Sehubungan dengan itu, plaintif ('Fairview') melalui penguam caranya ... telah menghantar sepucuk surat bertarikh 16 Julai 2004 ... kepada defendan-defendan ('MAP') *menamatkan perianjian tersebut* dan menuntut agar defendan-defendan ('MAP') membayar kepada plaintif ('Fairview') ganti rugi sebanyak RM1,500,000.

(17) Oleh yang demikian, plaintif ... menuntut penghakiman seperti berikut:

(i) suatu deklarasi bahawa perjanjian usahasama bertarikh 28 Mac 1997 di antara plaintif dan MAP adalah batal;

(ii) ganti rugi khas berjumlah RM1,500,000;

(iii) lain-lain.

[4] In short, it is asking the High Court to declare the joint venture agreement with MAP was terminated and also special damages of RM1,500,000. It is not asking for specific performance.

[5] Because both Yuny-Li Home ('plaintiff') and Fairview Development are interested in the said land by virtue of their agreements with MAP, and because Fairview Development ('defendant') had lodged a private caveat and the plaintiff Yuny-Li Home did not, Yuny-Li Home filed this suit against the defendant. In short, both plaintiff and defendant in this case are interested in the land where MAP is the beneficial owner. Yuny-Li Home now wants the private caveat lodged by the defendant, Fairview to be removed.

[6] By the originating summons ('encl 1'), the plaintiff prayed, inter alia:

(a) an order that the private caveat entered by the defendant be removed pursuant to s 327(1) of the National Land Code ('NLC');

(b) an injunction to restrain the defendant from presenting any application for the entry of further caveats on the said land pursuant to s 327(1) and s 329(2) of the NLC; and other reliefs.

[7] Pending the disposal of the civil suit, the plaintiff applied for and the High Court granted an order for interim injunction on 30 November 1992 restraining MAP from dealing with the said land.

THE PLAINTIFF'S SUBMISSIONS

[8] The plaintiff submitted that only a person/body aggrieved by the existence of a private caveat can apply to the court for an order for it's removal. It is for Yuny-Li Home ('applicant') to show he is aggrieved by the existence of a private caveat. The reason is because the applicant is not the registered proprietor of the land.

See:

(a) s 327(1) of the NLC;

(b) *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC) (per Diplock at p 215).

[9] The plaintiff, being a purchaser of the said land and suing for specific performance of the sale and purchase agreement, is aggrieved by the existence of the said private caveat on the said land. He is the purchaser seeking specific performance.

[10] In the event the said private caveat is not removed, the High Court in the civil suit may not grant the relief of specific performance to the plaintiff. This is because the existence of a caveat prohibits the registration of the transfer of the title of the said land to the plaintiff's name.

See:

(a) s 322(2)(a) of the NLC;

(b) *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zaina Abidin bin Raja Hussin* [1997] 2 MLJ 487 (CA) (per Mokhtar Sidin JCA) at p 499:

> The Code contains no definition who is an aggrieved person. To my mind, the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

Test for removal of private caveat

[11] Once the plaintiff had crossed that hurdle, onus shifts to the defendant. The test for removal of a private caveat is as follows:

(a) whether the grounds expressed in the application for the caveat are sufficient in law to support a caveat;

(b) whether the caveator's claim based on the affidavits filed, discloses a serious question meriting a trial;

(c) whether on the balance of convenience/justice, it would be better to maintain the private caveat until the trial of the action.

[12] If the caveator fails to satisfy the court on any of the three requirements, the caveat ought to be removed. Fairview Development has to show the three requirements are in their favour. Only then can the caveat be maintained.

See:

(a) *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (CA) (per Gopal Sri Ram JCA at pp 741–743);

(b) *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC) (per Lord Diplock at p 215)

No caveatable interest

[13] The defendant's claims set out in the Form 19B, the statutory declaration, the writ of summons and the statement of claim does not amount in law to a caveatable interest as:

(a) The object of the joint venture agreement is to make a profit by selling office space. It is not ownership. It's for money. See *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247 (CA) (per Siti Norma Yaakob JCA) at pp 250–251:

> The appellant has every intention to develop all the three lots into a housing estate and it is the respondent's contention that her company, Airport Auto, would enter into a joint venture agreement with the appellant for that project. As evidence of this, the respondent produced an unsigned joint venture agreement which the appellant refused to execute. It was following the appellant's conduct in refusing to acknowledge Airport Auto as a partner of the housing project that the respondent lodged the caveat on 7 July 1993, to protect her company's interests in the land. At the same time, Airport Auto filed Malacca High Court Civil Suit No 22–111 of 1993 on 14 December 1993 against the appellant and Kumpulan Realty praying for a number of reliefs, but as against the appellant, Airport Auto's principal reliefs are:
>
> (1) for a declaration that between them there exists a valid and enforceable joint venture agreement over the land; and
>
> (2) that the appellant execute the joint venture agreement.
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> In the proceedings before us, what interest does the respondent possess? It is not in the land. That has already been validly sold. *Her interest really lies in the profits that her company hopes to gain from the joint venture agreement with the appellant, which is being challenged by the appellant. The civil suit testifies to this. As her interest is only monetary in nature, she has therefore no caveatable interest over the land.* She cannot continue to have the private caveat lodged by her extended until after the disposal of the civil suit. (Emphasis added.)

See further *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522 (CA) (per Gopal Sri Ram JCA) at p 525:

A It is established by authority that a joint venture agreement to develop land and to share proceeds of the development does not confer a caveatable interest even if the agreement itself expressly provides for entry of a caveat ...'

In our case the interest is to make profit and not to own the land. Therefore, the case above apply.

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(b) In any event, the defendant is merely claiming for a declaration that the joint venture agreement has been *terminated* and not for specific performance of the joint venture agreement. See *EM Buxton & Anor v Packaging Specialist Sdn Bhd* [1987] 1 MLJ 342 (HC) (per Siti Norma Yaakob J) at p 344:

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> ... it lodged the caveat and subsequently filed a civil suit against the applicants seeking a refund of the deposit paid to account and other sums alleged to have been incurred. It is *not claiming specific performance* of the
D agreement and by so doing, the respondent has clearly shown an intention that it was no longer interested in purchasing the property but only to seek a refund of the deposit and other expenses incurred. To that end, it cannot be said that it had any interest in the land capable of being registered. As the only persons who can lodge a caveat are those entitled to obtain a title or interest in land and since the respondent has demonstrated that it was *no*
E *longer interested to acquire such interest*, it cannot insist that the caveat be allowed to remain. *From the nature of its civil suit, the respondent has only a claim in personam against the applicants for which a caveat is not the proper remedy as a means of protecting such a claim*. Admittedly, such a claim originated from the agreement but it is not capable of being registered under
F our Torrens system of registration. It is simply a claim for an unsecured debt and for this very reason, I allow this application.

In *Matair bin Suhaili & Anor v Rose Foo Chin Lan & Ors* [2007] 6 MLJ 125; [2007] 5 CLJ 406 (CA) (per Mokhtar Sidin JCA) at p 146 (MLJ); p 438 (CLJ), para 18 said:

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> ... the learned judge in his judgment found that the first plaintiff had validly terminated the agreement when the first plaintiff's solicitors, by their letter dated 29 July 1991, rescinded the agreement for non-payment of the balance of the purchase price. *With the termination of the said agreement, the interest of the first*
H *defendant in respect of the said land disappeared. For the reason the first defendant has no caveatable interest on the said land*. The natural sequence would be an order that the caveat lodged by the first defendant should be removed. (Emphasis added.) Even the purchaser who elected to terminate or whose S & P agreement has been terminated have no caveatable interest. The relief caveator seek must be for specific
I performance.

No serious questions to be tried

[14] The defendant's claim, which has to raise a serious question to be

tried, must relate to an interest in the said land. See *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC) (per Lord Diplock) at p 215:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it *his claim to an interest in the property* does raise a serious question to be tried ... ' (Emphasis added.).

Here Fairview will have to establish to an interest in the land. The plaintiff's council submitted that 'if you terminate the agreement, you are interested in damages and your interest is not caveatable'.

[15] The defendant's claim as per its own statement of claim is for:

(i) Suatu deklarasi bahawa perjanjian usahasama bertarikh 28 Mei 1997 di antara plaintif dan MAP adalah batal;

(ii) Ganti rugi khas berjumlah RM1,500,000;

(iii) Ganti rugi am;

(iv) Ganti rugi teladan ('Exemplary');

(v) Ganti rugi teruk ('Aggravated').

See *exh 'MC–10'* of the affidavit affirmed by Dr Molly Cheah Bee Li on 23 March 2008.

[16] In other words, the defendant's claim is merely for monetary relief and does not relate to an interest in the said land. It follows that there is no serious question to be tried in respect of a claim to an interest in the said land.

Balance of convenience

[17] On the balance of convenience, it would be better to remove the said private caveat than to allow it to remain.

(a) The removal of the said private caveat would enable the High Court in the civil suit to consider granting an order for performance in favour of the plaintiff.

(b) The said private caveat is an act in furtherance of the breach of the injunction order.

(c) The defendant's claim against MAP is not in respect of the said land but purely monetary in nature ie for damages. Based on the above, caveat

should be removed.

Injunction

[18] The plaintiff also prays for an injunction to restrain the defendant from presenting any application for the entry of further caveats on the said land based on the like claim as that on which the said private caveat was based. Injunction is similar to s 329(2) of the NLC.

See:

(a) s 329(2) of the NLC;

(b) *Damodaran v Vasudeva* [1974] 1 MLJ 128 (HC) (per Syed Agil Barakbah J) at pp 128–130.

This is to show that injunction can be granted by the court.

Damages

[19] The plaintiff further prays for damages for the wrongful entry of the caveats and for the damages to be assessed by the registrar.

THE DEFENDANT'S SUBMISSIONS

[20] The plaintiff's present action against the defendant is both misconceived and premature.

(20.1) The plaintiff has not shown that they have the locus or the right to initiate this action as the plaintiff is not the registered owner of the said land.

(20.2) Whether the plaintiff is a beneficial owner is disputable and this question has to be settled in an action by the plaintiff against both MAP and the defendant to determine the rightful or beneficial owner of the said land.

(20.3) Only upon the above question having been settled it would be incumbent on the plaintiff to bring the present action.

(20.4) The plaintiff has not shown that it has entered a caveat on the said land after entering into a sale and purchase agreement or any other agreement with MAP.

(20.5) The plaintiff's failure to enter into a caveat, under the NLC.

(20.6) The NLC has provisions for the plaintiff to protect its interest or rights (which the defendant asserts here have yet to be proven) and give a warning or notice to the whole world.

(20.7) As such, the plaintiff has lost any right or interest it may have over the said land, and certainly does not have any priority over the claim of the defendant.

(20.8) The question of priority has to be settled by a court of law and it is submitted that the present action cannot succeed in persuading the honourable court to remove the said caveat.

(20.9) The plaintiff's failure acts as an estoppel against any right or interest it may have over the said land.

(20.10) There is no relationship or nexus between the plaintiff and the defendant as the defendant has acted independently and at arms length, with a proper and substantial consideration (RM375,541 paid by the defendant to MAP against the sum of RM50,357 paid by the plaintiff to MAP) having been paid.

(20.11) The proper action of the plaintiff has to be against MAP but not against the defendant.

(20.12) The plaintiff's failure to enter into a caveat as a means of warning or notice to the whole world means it has lost its legal or statutory rights, whereas the NLC provides the defendant with both legal and statutory rights.

[21] The defendant crave leave to refer to the case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, at p 3 of the defendant's bundle of authorities, where the Privy Council held that:

> The system of private caveats is substituted for the equitable doctrine of notice in English land law. By s 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveators consent until the caveat is removed ...
>
> Their Lordships accept this is an apt analogy with its corollary that caveats are available, an appropriate cases, for the interim protection of rights to title to land or registrable interest in land are alleged by the caveator but not yet proved.

The defendant's submissions to resist the removal of caveat

[22] In the case of *Luggage Distributor (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 where the Court of Appeal referred to the case of *Eng Mee Yong*, Lord Diplock held as follows:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on

A the balance of convenience it would be better to maintain status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

The appellant in this case is also a registered proprietor.

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[23] In summary, the defendant needs to prove as follows:

(a) a caveatable interest;

(b) there is serious question to be tried; and

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(c) balance of convenience.

[24] Caveatable interest

(24.1) The defendant has entered into a joint venture agreement with MAP on 28 May 1997 and had duly paid the sum of RM375,541 to MAP. This by itself is a caveatable interest.

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(24.2) The plaintiff has not shown what right it has under the law as a caveator or caveatee or as a registered land owner.

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(24.3) The defendant, has, after the execution of the joint venture agreement, incurred further expenses in carrying out development works such as soil investigation, survey and creation of a project model and so on. Such works by themselves are a notice to the world about the intention of the defendant. The plaintiff has not shown in what way it has warned the defendant against further actions. In fact, the defendant did not know about the plaintiff's relationship with MAP until this action was served on the defendant.

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(24.4) The plaintiff (as well as MAP) has never informed the defendant that it has entered into a sale and purchase agreement with MAP for the purchase of the said land, ie the sale and purchase agreement dated 14 March 1989.

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(24.5) The joint venture agreement on 28 May 1997 specifically states that the defendant as the developer was deemed to be the absolute owner of certain floor areas and the car parks. This clause illustrates that the right of the defendant is not merely in developing the said land but to take possession of the said land for both development and future ownership. As such, it is submitted that the joint venture agreement cannot and does not have a lesser value than a straight forward sale and purchase agreement. In other words, the defendant as developer was also a purchaser of the said land.

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(24.6) The present caveat was not the 'original' caveat. The original caveat was 'renewed' twice since its first lodgement. Thus, it is strange that the

plaintiff has never sought in all these years to challenge the defendant's rights or interest. In fact the delay of the plaintiff means that the caveatable interest of the defendant can no longer be challenged by the plaintiff. It is also submitted that the plaintiff is estopped by its own lethargy or delay to take action.

(24.7) Further, it is submitted that only MAP has the right to challenge the defendant but MAP has never done so.

(24.8) It has to be emphasised that the defendant (and Fairview, the developer) has never delayed or become lethargic in protecting its rights. The defendant has taken an action against MAP to enforce its legal rights and interest vide Shah Alam High Court Writ Summons No MT2–22–196 of 2005.

It was held under the case of *Rohaya bt Ibrahim v Yusof bin Ibrahim* [2008] 7 MLJ 466, that:

> It is a trite law that the purpose of filing a caveat is to preserve the status quo over the said land pending resolution by the court of any dispute therein (see *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44). On account that the effect of the entry of a caveat is far reaching and rather stifling, it is implored upon caveator to act fast without delay to file an action in a court of law to enforce his alleged legal right over the said land or resolve any outstanding dispute therein within the context over which the caveat was entered.

Caveator must enforce without delay. Defendant had done both, filed an action and entered a caveat.

(24.9) Having filed a suit against MAP, it is only right that the said suit has to be finally determined by the court before the defendant loses its caveatable interest. In fact, MAP has never challenged the fact that the defendant has a caveatable interest. As such, it is submitted that it is disingenuous of the plaintiff to take this action against the defendant.

(24.10) In the event that this honourable court removes the caveat entered by the defendant, the defendant has no other available avenue to enforce any judgment obtained by the defendant against MAP in order to compensate the losses incurred by the defendant.

(24.11) It is not right for the plaintiff to argue that the defendant's claim on the said land is only monetary in nature and therefore has no caveatable interest. The defendants wants to develop the said land and it is not a question of having its deposit being returned by MAP. On the other hand, the plaintiff has never shown that it has gone ahead to pay another sum of money besides the initial sum. But due to the nature of

A the disagreement it is better for Fairview to pray for a termination of the agreement, get back its money and seek damages which is reflected in the suit against MAP by Fairview.

(24.12) The defendant submits that the cases referred by the plaintiff are distinguishable in facts and different from this action before this honourable court.

(24.13) In the case of *Trans-Summit Sdn Bhd v Chun Nyook Lin*, the defendant humbly submits that the facts of the case are not the same with this action. In the case of *Trans-Summit*, the respondent has assigned all its rights under the option to purchase to the appellant which subsequently purchased the land to develop the land into a housing estate. The respondent contended that her company was supposed to enter into a joint venture agreement with the appellant for the project. However, the appellant refused to recognise and acknowledge the respondent as its partner in the housing project and the respondent lodged a caveat to protect her company's interest. The caveat was removed because the respondent has no caveatable interest.

(24.14) In the present case before this honourable court, the defendant has entered into a valid joint venture agreement with MAP and in order to protect its legal rights and interest on the said land, a caveat was entered by the defendant. Further, the defendant has also taken legal action against MAP. MAP has never disputed the caveatable interest of the defendant. Thereafter, plaintiff in that case (Fairview) sued MAP in Case No MT2–22–196 of 2005 and prayed as in para 17(a).

(24.15) It is interesting to note that due to the plaintiff's failure to give notice to the whole world about the sale and purchase agreement between the plaintiff and MAP, the defendant has been led to believe that the said land is without encumbrances or has a prior interest.

(24.16) It is now unfair for the plaintiff to argue and request the assistance of this honourable court to make good the plaintiff's own failure and compel the defendant to let go of the defendant's legal rights and interest under the argument that the defendant's claim is only monetary in nature.

[25] Serious question to be tried:

(25.1) The defendant humbly submits that there is a serious question to be tried due to the failure of MAP to fulfill its obligations under the joint venture agreement.

(25.2) The plaintiff has to show why the defendant's present and previous caveats were never challenged until now.

(25.3) The plaintiff's action lacks merit as it has not shown why it should have

the locus to file this case and to compel the removal of the caveat when it is not the registered owner of the said land, and it has not obtained any judgment to show that it has a prior beneficial interest.

(25.4) The plaintiff has not shown that (even if it has a beneficial interest) it has a priority over the rights and interest of the defendant.

(25.5) Has the plaintiff actually purchased the said land and carried out its obligation under the terms and conditions of the sale and purchase agreement with MAP or it has merely deposited a certain sum of money? This is a serious question indeed.

(25.6) In what way is the plaintiff an interested party or possess legal rights if beneficial ownership or registered ownership cannot be proved.

(25.7) It is the defendant's contention that the status quo should be maintained between the legal rights of the defendant vis-a-vis MAP. As submitted earlier, the defendant's suit against MAP ('Shah Alam High Court MT2–22–196 of 2005') has yet to be determined, thus the caveat cannot and should not be removed. Further, if the plaintiff wishes to protect any interest or right, it can always apply to be included as an intervener in the said suit. Therefore, it it the defendant's contention that the caveat should remain on the land to preserve the status quo of the action against MAP.

[26] Balance of convenience

(26.1) The defendant submits that on the balance of convenience the caveat should be allowed to remain on the said land until the disposal of the defendant action against MAP as the loss incurred by the defendant is much greater than the plaintiff. The defendant has duly paid the RM375,541 as agreed under the joint venture agreement between the defendant and MAP whereas the plaintiff has only paid RM50,357 as a deposit under the sale and purchase agreement with MAP.

(26.2) In addition, it was the plaintiff's failure to enter a caveat (see the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202, at p 97 of the defendant's bundle of authorities for compliance with NLC) to protect its rights and interest based on the sale and purchase agreement with MAP has led the defendant to believe that there was no prior interest on the said land before the execution of the joint venture agreement with MAP. The plaintiff has been guilty of an act of omission and thus it cannot claim any priority as accorded to the appellant in the case of *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169, at p 152 of the defendant's bundle of authorities.

(26.3) The plaintiff's delay in pursuing the removal of the caveat (even if it has

the right) is a form of acquiescence and estoppel. The plaintiff should be estopped from taking this action as the defendant's caveat was renewed twice and the joint venture agreement was signed in 1997.

(26.4) The plaintiff tries to make hay of the fact that there was an injunction. But, the defendant has failed to inform the court that the injunction is only enforceable against MAP and not the defendant. Further, the injunction does not prevent the said land from being dealt with, but it only prevents certain actions by the servants and/or agents (or office bearers) of MAP. The injunction was also never served on the defendant. Most importantly, the ambit of the injunction is such that the plaintiff's recourse does not include the removal of any caveat on the said land.

(26.5) The defendant has a statutory right to lodge a caveat and it has chosen to exercise the said right without delay. In the case of *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145, the court considered what was the substance of the agreement. It is submitted that the substance of the joint venture agreement is such that it creates a right for the defendant to enter into a valid caveat that cannot be removed by the plaintiff. It is not for the plaintiff to remove such a right without contesting in a court of law to show that it has the right of the caveatee. It is also contended that the defendant has the 'better equity' having paid a large sum of money and having carried out a lot of ancillary development works on the said land, see the case of *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330, at p 143 of the defendant's bundle of authorities.

(26.6) It is submitted that the only way out for the plaintiff is to apply to be joined as a party in the defendant's said suit (MT2–22–196 of 2005) and not otherwise.

(26.7) To remove the private caveat would mean that the substratum of the defendant's action against MAP will fall as MAP will be at liberty to dispose of the said land to a third party or otherwise deal with the said land and this will leave the defendant no available avenue to enforce any judgment against MAP.

[27] Conclusion:

(27.1) The defendant submits that the private caveat should not be removed until and unless the defendant's action against MAP (MT2–22–196 of 2005) is defeated.

(27.2) It is to be noted that it was the plaintiff's failure to give a notice to the whole world (in the form of a caveat) after the execution of the sale and purchase agreement with MAP that has led the defendant to believe that there was no prior interest intact on the said land.

(27.3) is worthwhile to refer to the case of *Butler v Fairclough* (1917) 23 CLR 78 it was held that:

> In the case of a contest between two equitable claimant the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in tie may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice ...
>
> Under the Australian system a clear title on the register is, for some purposes at any rate, equivalent to possession of the title deeds. A person who has an equitable charge upon land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat ...

(27.4) In the present case, it is an undeniable fact that the defendant claim is 'the first in time' and therefore has priority over any interest the plaintiff may have against MAP. In the case of *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53, the Federal Court held that the respondent's caveat was earlier in time and that it was not right for the caveat to be removed pending the result of the respondent's action. In *Macon*, it was made abundantly clear that a pending action should be resolved first. It is thus submitted that on the basis of *Macon*, this present case should be decided likewise.

(27.5) Therefore, the defendant humbly prays to this honourable court to dismiss the plaintiff's application and the prayers thereto with costs to be taxed.

COURT

[28] After having heard the oral submissions of both counsel based on the written submissions and having referred to the laws and cases as cited by both parties, I am of the opinion that:

(a) The plaintiff is an aggrieved party within the meaning of s 327(1) of the NLC.

(b) The plaintiff is suing MAP for specific performance of the said land according to the sale and purchase agreement between the two parties on 14 March 1989.

(c) The defendant had entered into a joint venture agreement with MAP on 28 May 1997. At that point in time, there is an injunction against MAP restraining MAP, it's members, agents, servants or otherwise from dealing with the said land. MAP breached the injunction by entering into the JV agreement with defendant. There was problem with the JV

agreement and the defendant's solicitors wrote to MAP to terminate the joint venture agreement. In the statement of claim in the suit between the defendant (Fairview) against the office-bearers of MAP (Civil Suit No MT2–22–196 of 2005) the defendant at para 16 contains the following:

> Sehubungan dengan itu, Plaintif (Fairview) melalui peguamcaranya ... telah menghantar sepucuk surat bertarikh 16.7.2004 yang dihantar secara pos berdaftar kepada Defendan-Defendan menamatkan Perjanjian tersebut ... dan MAP membayar kepada Plaintif (Fairview) gantirugi sebanyak RM1,500,000.

I am of the view that this letter very clearly shows that the defendants had terminated the joint venture agreement. In its prayer the defendant, Fairview did not ask for specific performance of the said land. Instead it sought the court to declare that the joint venture agreement dated 28 May 1997 terminated. In addition it asked for special damages of RM1,500,000.

[29] I agree with the submission by counsel for the plaintiff when he submitted that the defendant has no caveatable interest. I am bound by the several authorities submitted on this point.

[30] In *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247 (CA) (per Siti Norma Yaakob JCA) at pp 250–251:

> The appellant has every intention to develop all the three lots into a housing estate and it is the respondent's contention that her company, Airport Auto, would enter into a joint venture agreement with the appellant for that project. As evidence of this, the respondent produced an unsigned joint venture agreement which the appellant refused to execute. It was following the appellant's conduct in refusing to acknowledge Airport Auto as a partner of the housing project that the respondent lodged the caveat on 7 July 1993, to protect her company's interests in the land. At the same time, Airport Auto filed Melacca High Court Civil Suit No 22–111 of 1993 on 14 December 1993 against the appellant and Kumpulan Realty praying for a number of reliefs, but as against the appellant, Airport Auto's principal reliefs are:
>
> (1) for a declaration that between them there exists a valid and enforceable joint venture agreement over the land; and
>
> (2) that the appellant execute the joint venture agreement.
>
> In the proceedings before us, what interest does the respondent posses? It is not in the land. That has already been validly sold. *Her interest really lies in the profits that her company hopes to gain from the joint venture agreement with the appellant, which is being challenged by the appellant. The civil suit testifies to this. As her interest is only monetary in nature, she has therefore no caveatable interest over the land*. She cannot continue to have the private caveat lodged by her extended until after the disposal of the civil suit. (Emphasis added.)

In *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522 (CA) (per Gopal Sri Ram JCA) at p 525:

> It is established by authority that a joint venture agreement to develop land and to share proceeds of the development does not confer a caveatable interest even if the agreement itself expressly provides for entry of a caveat .... In our case the interest is to make profit and not to own the land. Therefore, the case above apply.

In any event, the defendant is merely claiming for a declaration that the joint venture agreement has been terminated and not for specific performance of the joint venture agreement.

See *EM Buxton & Anor v Packaging Specialist Sdn Bhd* [1987] 1 MLJ 342 (HC) (per Siti Norma Yaakob J) at p 344:

> ... it lodged the caveat and subsequently filed a civil suit against the applicants seeking a refund of the deposit paid to account and other sums alleged to have been incurred. It is *not claiming specific performance of the agreement and by so doing, the respondent has clearly shown an intention that it was no longer interested in purchasing the property but only to seek a refund of the deposit and other expenses incurred*. To that end, it cannot be said that it had any interest in the land capable of being registered. As the only persons who can lodge a caveat are those entitled to obtain a title or interest in land and since the respondent has demonstrated that it was *no longer interested to acquire such interest*, it cannot insist that the caveat be allowed to remain. *From the nature of its civil suit, the respondent has only a claim in personam against the applicants for which a caveat is not the proper remedy as a means of protecting such a claim*. Admittedly, such a claim originated from the agreement but it is not capable of being registered under our Torrens system of registration. It is simply a claim for an unsecured debt and for this very reason, I allow this application in terms of prayers one and three of the origination motion ...
>
> (Emphasis added.)

See further *Matair bin Suhaili & Anor v Rose Foo Chin Lan & Ors* [2007] 6 MLJ 125; [2007] 5 CLJ 406 (CA) (per Mokhtar Sidin JCA) at p 438, para 18:

> ... the learned judge in his judgment found that the first plaintiff had validly terminated the agreement when the first plaintiff's solicitors, by their letter dated 29 July 1991, rescinded the agreement for non-payment of the balance of the purchase price. *With the termination of the said agreement, the interest of the first defendant in respect of the said land disappeared. For the reason the one defendant has no caveatable interest on the said land*. The natural sequence would be an order that the caveat lodged by the first defendant should be removed. (Emphasis added.)

Even the purchaser who elected to terminate or whose sale and purchase agreement has been terminated have no caveatable interest. The relief

caveator seek must be for specific performance.

No serious question to be tried

[31] The defendant's claim, which has to raise a serious question to be tried, must relate to an interest in the said land. See *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC) (per Lord Diplock) at p 215:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it *his claim to an interest in the property* does raise a serious question to be tried ... (Emphasis added.)

Here Fairview will have to establish to an interest in the land. If you terminate the agreement, you are interested in damages and your interest is not caveatable.

[32] For the above reasons, I allow the plaintiff's claims in para one, two, three and six of encl 1.

Plaintiff's claims allowed in part.

Reported by Kohila Nesan